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Supreme Court, U.S.
FILED
JUN 23 2008
OFFICE OF THE CLERK

No. 07-1462

IN THE

Supreme Court of the United States

RAYMOND BISCHOFF,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY, LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, ZIELKE, PEDLEY, GORDINIER, DWYER, CLAYTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT AND JOHN H. DWYER, JR.

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QUESTION PRESENTED

Should the well established, long-standing rule that the Seventh Amendment of the U.S. Constitution does not apply in state courts be revisited when a state court litigant was denied a jury trial after failing to properly demand one pursuant to state procedural rules and then collaterally attacked the state court ruling in the United States District Court while the state court action was pending?

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STATEMENT OF THE CASE

This action[1] began in Jefferson County Circuit Court in Louisville, Kentucky, as the compensation phase of an eminent domain proceeding filed by the Respondent Louisville and Jefferson County Metropolitan Sewer District (hereinafter "MSD"), to obtain permanent and temporary sewer easements across property owned by Petitioner Raymond Charles Bischoff. The right to take the easements has been finally established, and the sewer has been installed.

Before the Circuit Court, Petitioner Bischoff made a belated motion for a jury trial. Respondent John H. Dwyer, Jr.[2], acting as attorney for Respondent MSD objected to Petitioner's belated motion. The Circuit Court denied Petitioner's motion and held a bench trial.

The relevant facts concern the timing of filing certain pleadings and motions, including Mr. Bischoff's very belated request for a jury trial. The relevant filings occurred as follows:

- June 11, 2002 — MSD files a verified petition for condemnation against Raymond Charles Bischoff.

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[1] Petitioner has provided the wrong docket number for this case in its Petition; the correct docket number is 07-1462.

[2] Mr. Dwyer is an attorney for the formerly named law firm of Pedley, Zielke, Gordinier and Pence. Petitioner has mistakenly included the law firm as a party to this appeal when it was never named as a party in the underlying state court proceedings.

- August 20, 2002 — Personal service on Raymond Charles Bischoff.
- September 11, 2002 — Mr. Bischoff files what is termed "correspondence" on the court docket sheet. This correspondence objects to MSD's "compensation offer" and to MSD's condemning a sewer easement across his property. This document contains no jury demand.
- September 16, 2002 — MSD moves for a hearing on its right to condemn an easement across Mr. Bischoff's property.
- December 30, 2002 — MSD files a Statement of Exceptions in which it contests the amount of the commissioners' award.
- January 14, 2003 — Mr. Bischoff files a document either objecting to or moving to strike MSD's Statement of Exceptions. This document contains no jury demand.
- January 14, 2003 — Bischoff files his own exceptions to the

commissioners' award. This document contains no jury demand.

- January 30, 2003 — The trial court enters an interlocutory judgment condemning the permanent and temporary easements across Mr. Bischoff's property.
- Januai y 30, 3002 — Mr. Bischoff files a motion to set aside the trial court's Interlocutory Judgment.
- April 4, 2003 — The trial court enters an order denying Mr. Bischoff's motion to set aside the Interlocutory Judgment.
- August 7, 2003 — Mr. Bischoff files a written request for a jury trial. There is no indication that Mr. Bischoff tendered the required fee for a jury trial.
- August 18, 2003 — Mr. Bischoff makes an oral motion for a jury trial.
- September 5, 2003 — The trial court enters an order denying Mr. Bischoff's motion for a jury trial.

Pursuant to Kentucky Civil Rule 38.02, a jury demand must be served within 10 days of the last pleading directed to the issue. In eminent domain actions, the last pleading directed to the issue of compensation is the statement of exceptions, which must be filed within thirty days of the entry of the interlocutory judgment. Kentucky Revised Statute 416.620(6). Petitioner Bischoff failed to meet this deadline.

In denying Mr. Bischoff's motion for a jury trial, the Circuit Court stated:

> By Motion heard on August 18, 2003, the respondent made a request for a jury trial by jury. A hearing on the issue of the property value and compensation to the respondent was scheduled for August 26, 2003. The petitioner objects to this request for a jury trial stating that request was not made timely. The Court finds that pursuant to Civil Rule 38, the respondent's request for a jury trial is not timely. Further, pursuant to Civil Rule 38.04, the basis for the respondent to request a jury trial was not the result of excusable neglect discussed in Civil Rule 6.02.

TR 109.

A bench trial on valuation was ultimately held on October 25, 2004. At trial, MSD presented testimony from licensed real estate appraiser Sharon Hall that the difference in the value of the property before and after the taking, along with the value of a temporary work

easement, was at most $5,522. 30-5-04-VCR-062 at 15:23:10-35.

Mr. Bischoff's proffered testimony on valuation was limited to the testimony of Reba McIntyre, a local realtor. Ms. McIntyre testified that Mr. Bischoff had received an offer of $3,000,000 for the property. Ms. McIntyre admitted that this offer was based on the existence of the sewer being constructed by this project, and that she had no opinion of the value of the property prior to the addition of the sewer. TR 135-37 *Final Order*. In fact, Ms. McIntyre conceded that Mr. Bischoff's property would be worth MORE after the taking, *i.e.*, after the sewers were installed. 30-5-04-VCR-062 at 16:20:07-40. Mr. Bischoff never offered any proof that the subject property had a higher value before the taking. *Final Order*, TR 135-37.

Based on this proof, the trial court entered its final judgment on November 4, 2004, awarding Mr. Bischoff $5,522, the precise amount proposed by MSD. *Id.* The judgment also notes that Mr. Bischoff failed to offer any proof of diminution of value at the trial. *Id.* Mr. Bischoff appealed and filed a parallel action in the United States District Court for the Western District of Kentucky.

The United States District Court for the Western District of Kentucky dismissed Petitioner Bischoff's claims abstaining based on the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). The United States Court of Appeals for the Sixth Circuit upheld the decision of the United States District Court.

REASONS FOR DENYING THE PETITION

The facts of this case do not merit review as they do not present any unique question or point of law that should be revisited. The case of *Younger v. Harris*, 401 U.S. 37, 49-53 (1971), requires that a federal court abstain from ruling on a case if the same issues are litigated in a state court proceeding where all defenses may be raised. Mr. Bischoff was properly in state court where he raised each argument currently before this Court. Further, the Seventh Amendment to the U.S. Constitution is not binding on the states. Finally, Bischoff waived his right to appeal the District Court's dismissal of his claims because he never filed an objection or response to Respondents' motions to dismiss.

I. Seventh Amendment Does Not Apply.

Petitioner's sole claim is for a violation of a Seventh Amendment right to a jury trial in state court. But the Seventh Amendment is not applicable to the states through the Fourteenth Amendment. *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876); *accord Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 432 (U.S. 1996) (explaining that the Seventh Amendment "governs proceedings in federal court but not in state court".). This Court, Federal courts and numerous state courts have been consistent in determining that the Seventh Amendment is not applicable to the states. *See generally e.g. Chesapeake & O. R. Co. v. Kelly's Adm'x*, 161 Ky. 655, 659 (Ky. 1914); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (Ca. 2005); *Artway v. Scheidemantel*, 671 F.Supp. 330 (D. N.J. 1987); *Dohany v. Rogers, State*

Highway Commissioner of Michigan, et al., 281 U.S. 362, 50 S.Ct. 299 (1930); *Melancon v. McKeithen*, 345 F.Supp. 1025 (E.D. La. 1972); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991); *Wagner Electric Mfg. Co. v. Lyndon*, 43 S.Ct. 589, 262 U.S. 226 (1923); *Beauclaire v. Greenhouse*, 922 So.2d 501 (La. 2006); *Chisolm v. TranSouth Financial Corp.*, 194 F.R.D. 538 (E.D.Va., 2000); *O'Connor v. State of Nev.*, 507 F.Supp. 546 (D.C.Nev.1981), *affirmed* 686 F.2d 749, certiorari denied 103 S.Ct. 491, 459 U.S. 1071; *Iacaponi v. New Amsterdam Cas. Co.*, 258 F.Supp. 880 (W.D. Pa. 1966), *affirmed* 379 F.2d 311, certiorari denied 88 S.Ct. 802, 389 U.S. 1054.

Respondent Judge Clayton's denial of Petitioner's motion for a jury trial, therefore, did not implicate his rights under the Seventh Amendment. Thus, his complaint does not allege a claim arising under the U.S. Constitution. For the same reason the complaint does not allege a claim arising under the laws of the United States.

The only federal law seemingly implicated here is 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Because Judge Clayton's denial of Petitioner's motion for a jury trial did not deprive him of any federal right, privilege, or immunity, the complaint did not state a claim under 42 U.S.C. § 1983. Therefore, the District Court did not have jurisdiction over this case under 28 U.S.C. § 1331 or 28 U.S.C. § 1343.

Assuming for the sake of argument only that the District Court found a valid cause of action for violation of Petitioner's Seventh Amendment right to a jury trial, there was no allegation that either Respondent MSD or Dwyer had a duty to Petitioner. Therefore, their dismissal was valid.

Petitioner moved for a jury trial. Respondent MSD through counsel objected to the motion as being untimely. Judge Clayton consequently denied Petitioner's motion. Neither Respondent MSD nor Dwyer owed Petitioner a duty under these circumstances. With no duty, there was no viable cause of action against either MSD or Mr. Dwyer. *See e.g., Doe v. Claiborne County*, 103 F.3d 495, 511 (6th Cir. 1996) (holding that "for constitutional tort liability on the basis of inaction must derive from some identifiable source of duty").

II. Younger Abstention Is Proper.

In its Memorandum and Order dated March 15, 2007, the District Court correctly cited the abstention doctrine established in *Younger v. Harris*, 401 U.S. 37, 49-53 (1971), as another basis for its order dismissing Petitioner's claims. *Younger* formalized a long-standing national policy forbidding federal courts to interfere with

state court proceedings. It is applicable here as Petitioner wished to have an ongoing state court action stopped in mid-stream and transferred to the federal court system. It cannot be done. *Younger* involved an on-going state criminal proceeding; however, the abstention doctrine has been expanded to cover civil proceedings such as the one before this Court in this case. *See, e.g., Huffman v. Pursue*, 420 U.S. 592 (1975).

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Supreme Court set out a three part test for determining when the abstention doctrine should be applied. That test is met here. As described by the Sixth Circuit, the test is as follows:

> *Younger* abstention in civil cases requires the satisfaction of three elements. Federal courts should abstain when (1) state proceedings are pending; (2) the state proceedings involve an important state interest; and (3) the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims." *Hayse v. Wethington*, 11 F.3d 18, 20 (6th Cir. 1997).

As set forth in the Statement of Facts, state proceedings were pending at the time Petitioner filed the U.S. District Court action in this case. Petitioner appealed the decision of the Jefferson Circuit Court to the Kentucky Court of Appeals where Petitioner prevailed. The Court of Appeals opinion was the subject of a motion for discretionary review at the Kentucky Supreme Court, which reversed the Court of Appeals.

The final state court action occurred in April of 2008, long after this action was filed. Thus the first element of the *Younger* abstention test is met.

Second, the state proceedings must involve important state interest. In this case, the state proceedings must determine whether a litigant in a state court condemnation action may waive his or her right to a jury trial by failing to ask for one by a date certain in a court scheduling order. This is an interest only to the state. Condemnation actions for a Kentucky public body corporate is uniquely a state interest. Whether to grant or not grant jury trials in state court is uniquely a state interest. Whether to allow state court judges to enforce state court scheduling orders is uniquely a state interest. The second element is thus met.

The third element asks whether the state proceedings will allow the litigant to raise constitutional issues. This element is also met. The Petitioner has been allowed to raise his constitutional issues in the state proceeding and has raised them in the Jefferson Circuit Court, the Kentucky Court of Appeals and now in the Kentucky Supreme Court which is empowered to rule on his constitutional issues if it grants discretionary review to do so.

III. The District Court and Sixth Circuit Lacked Jurisdiction Over This Claim.

Jurisdiction has not been proper in this case and subsequently violates 28 U.S.C. § 1257. Petitioner asked the United States District Court to exercise jurisdiction over a state court judgment. After the District Court

dismissed the suit, Petitioner appealed to the United States Court of Appeals to exercise jurisdiction over a state court judgment. Now, Petitioner is asking for a grant of certiorari from the United States Court of Appeals, not from the Kentucky Supreme Court. Thereby violating 28 U.S.C. § 1257.

The grant of federal jurisdiction over state court judgments is exclusive to the United States Supreme Court under 28 U.S.C. § 1257 and cannot begin with a complaint in a United States District Court followed by an appeal to a United States Court of Appeal. *Lance, et al, v. Gigi Dennis* 546 U.S. 459 (2006) *on remand* 2007 U.S. Dist. LEXIS 20965 (D. Colo. Mar. 23, 2007). *See also, District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed. 2d 206 (1983). "Accordingly, under what has come to be known as the *Rooker-Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Gigi Dennis* at 1201. As this Court has stated, the *Rooker-Feldman* doctrine is "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon v. Saudi Basic Indust. Corp.*, 544 U.S. 280, 284 (2005). Petitioner lost on its issues presented in the Kentucky state courts and then proceeded to file in Federal court to appeal the state court decision. This is impermissible under 28 U.S.C. § 1257.

IV. 28 U.S.C. § 2403 (b) is not applicable to this case.

Petitioner has stated that 28 U.S.C. § 2403 (b) "may apply" because as

> "[p]etitioner contends that, Kentucky KRS 416.550 to 416.670 mandates requiring a jury trial were violated [*sic*] by all Respondents. Also, the statues [*sic*] do not allow for just compensation in consideration of a main sewer line, noting that new construction on the easement property is totally eliminated for future use, not the normal utility easement consideration.

Petition, p. 3.

28 U.S.C. § 2403 (b) provides:

> In any action, suit, or proceeding in a court of the United States to which a **State or any agency, officer, or employee thereof is not a party**, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a

> proper presentation of the facts and law relating to the question of constitutionality. (emphasis added).

In this action, Petitioner has named Judge Denise Clayton[3] as a party[4] and she is an employee of the state. Moreover, this Court held that state officials who are sued in their official capacity for monetary damages are not considered "persons" subject to suit under 42 U.S.C. § 1983. *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 70-71 n. 10 (1989). Thus, 28 U.S.C. § 2403 (b) is not applicable.

Furthermore, Petitioner contends that "Kentucky KRS 416.550 to 416.670 mandates requiring a jury trial were violated by all Respondents." Kentucky Revised Statutes § 416.550-416.670 make no mention, express or implied, that Petitioner is entitled to a jury trial for property valuation in a condemnation proceeding. In fact, KRS § 416.570 states:

> Except as otherwise provided in KRS 416.560, a condemnor seeking to condemn property or the use and occupation thereof, shall file a verified petition in the Circuit Court of the county in which all or the greater

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[3] Judge Clayton's involvement with this case arises during her time serving on the bench for the Commonwealth of Kentucky Jefferson County Circuit Court.

[4] Petitioner has also named the Commonwealth of Kentucky as a party to this appeal, however, the Commonwealth of Kentucky was not a named party in the underlying Federal cases.

> portion of the property sought to be condemned is located, which petition shall state that it is filed under the provisions of KRS 416.550 to 416.670 and shall contain, in substance:
>
> (1) Allegations sufficient to show that the petitioner is entitled, under the provisions of applicable law, to exercise the right of eminent domain and to condemn the property, or the use and occupation thereof, sought to be taken in such proceedings;
>
> (2) A particular description of the property and the use and occupation thereof sought to be condemned; and
>
> (3) **An application to the court to appoint commissioners to award the amount of compensation the owner of the property sought to be condemned is entitled to receive therefor.**

KRS § 416.570 (emphasis added). This statute clearly demonstrates that property valuations for the amount of "just compensation" are determined through an appointment of commissioners and not a jury trial. Even if KRS § 416.570 was not sufficient to show that jury trials are not granted to determine the amount of compensation, KRS § 416.580 provides in even greater detail:

> (1) The Circuit Court, or in the absence of the Circuit Judge from the county, the Circuit

Court Clerk, **shall appoint as commissioners three (3) impartial housekeepers of the county who are owners of land.** They shall be sworn to faithfully and impartially discharge their duties under this section. **The commissioners shall view the land or material sought to be condemned and award to the owner or owners such a sum as will fairly represent the reduction in the market value of the entire property,** all of or a portion of which is sought to be condemned, said sum being the difference between the market value of the entire property immediately before the taking and the market value of the remainder of the property immediately after the taking thereof, together with the fair rental value of any temporary easements sought to be condemned. Within fifteen (15) days from the date of their appointment, they shall return a written report to the office of the Circuit Court, stating the above values in their award and shall describe in their report the property sought to be condemned. They shall be allowed a reasonable fee which shall be taxed as costs.

(2) In the event any person appointed to serve as commissioner fails, refuses or becomes incapable of acting, the court, or judge thereof, shall forthwith appoint a qualified person to fill the vacancy. A majority of the commissioners appointed and qualified have the power to act and to make and sign

> the award and report. **If a majority of the commissioners do not agree on a decision, three (3) new commissioners shall be appointed by the court on application by any of the parties to the action.**

KRS § 416.580 (emphasis added). Instead of a jury trial to determine the value of the property, three (3) commissioners are appointed. And even if those commissions cannot agree on a decision no jury trial is granted- three more commissioners are appointed to value the property. After the property's value has been determined by the commissioners an interlocutory judgment is entered. KRS § 416.610 (2).

The interlocutory judgment was entered January 30, 2003. Petitioner then had thirty (30) days from the date of entry of the interlocutory judgment to file a statement of exceptions. KRS § 416.620 (1). Petitioner could have questioned the amount of compensation at this time and been granted a jury trial; "[a]ll questions of fact pertaining to the amount of compensation to the owner, or owners, shall be determined by a jury, which jury on the motion of either party shall be sent by the court, in the charge of the sheriff, to view the land and material." KRS § 416.620 (1). However, Petitioner failed to make a timely statement of exceptions in response to the interlocutory judgment. Bischoff did not file his demand for a jury trial until August 7, 2003, almost three months past the last pleading directed to the issue of compensation and eleven months after Bischoff filed his first pleading in this case. Thus, Petitioner waived his right to a jury trial by not following applicable procedural rules in a timely fashion.

Failure to abide by filing deadlines that limit one's rights to a jury trial do not abridge Seventh Amendment rights because that person still had access to a jury trial. *See Beauclaire v. Greenhouse* 922 So.2d 501 (La. 2006); *Moore v. U.S.*, 196 F.2d 906 (5th Cir. 1952); *Maytag Co. v. Meadows Mfg. Co.*, 45 F.2d 299 (7th Cir. 1930), *certiorari denied*, 51 S.Ct. 489, 283 U.S. 843; *Montanez-Baez v. Puerto Rico Ports Authority*, 509 F.Supp.2d 152 (D. Puerto Rico 2007); *People v. Ramos*, 101 P.3d 478 (Ca. 2004); *Sperandeo v. Denny's, Inc.*, 683 So.2d 743 (5th Cir. 1996).

CONCLUSION

The legal issues presented in this case are clearly established and need not be revisited by this Honorable Court. For the foregoing reasons, Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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